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October 27, 2003
DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: May 2, 2003

Case Number: TSO-0038

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxxxxxx (hereinafter referred to as "the individual") to maintain an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." 1/ A local DOE Security Office suspended the individual's access authorization pursuant to the provisions of Part 710. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be restored.

I. Background

The individual has held a DOE security clearance since 1999. In 2000, the individual executed a Drug Certification in which he provided written assurance to the DOE that he would not use illegal drugs while holding a DOE security clearance. In August 2002, the individual tested positive on a drug test for amphetamines and methamphetamines. After a confirmatory drug test yielded positive results for the same two illegal drugs, the DOE suspended the individual's security clearance and initiated formal administrative review proceedings.

In October 2002, the DOE sent a Notification Letter to the individual advising that the individual's positive drug test results constituted derogatory information that falls within the purview of two potentially disqualifying criteria. The criteria at issue are set forth in the security regulations at 10 C.F.R. § 710.8, subsections (k) and (l) (Criterion K and L respectively). 2/

1/ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

2/ Criterion K pertains to information that a person has "[t]rafficked in, sold, transferred, possessed, used, or (cont'd)

The individual exercised his rights under the Part 710 regulations and requested an administrative review hearing. On May 5, 2003, the Director of the Office of Hearings and Appeals appointed me the Hearing Officer in this case. I conducted a hearing in this matter within the time frame prescribed in the regulations. 10 C.F.R. § 710.25(g). At the hearing, six witnesses testified, one on behalf of the DOE and five on behalf of the individual. In addition to the testimonial evidence, the DOE tendered six exhibits into the record, and the individual submitted 31 exhibits. I closed the record in this case on September 26, 2003 when I received the individual's post-hearing submission.

II. Regulatory Standard

A. The Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant

experimented with a drug or other substance listed in the Schedule of Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." 10 C.F.R. § 710.8 (k). Criterion L relates, in part, to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, . . . a violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility." 10 C.F.R. § 710.8 (l).

evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to an individual's access authorization eligibility in favor of the national security. *Id.*

III. Findings of Fact

The individual executed a Drug Certification on May 23, 2000 in which he agreed to refrain from using or becoming involved in any way with illegal drugs while holding a DOE access authorization. Exhibit (Ex.) 4. On August 29, 2002 the individual tested positive on a random drug test for the presence of methamphetamines and amphetamines. Ex. U.

IV. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c). ^{3/} After due deliberation, I have determined that the individual's access authorization should not be restored at this time. I cannot find that such restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

A. Security Concerns Associated with the Derogatory Information

The individual's positive drug test raises security concerns under both Criteria K and L. The security concern under Criterion K is that the individual might pick and choose which security rules that he will follow when protecting classified information just as he has chosen which criminal laws that he will obey. *See* Hearing Transcript (Tr.) at 14.

As for Criterion L, the individual's violation of his drug certification only two years after he executed that agreement constitutes a serious breach of trust that calls into question his honesty, reliability, and trustworthiness. In addition, a person who violates his own drug certification might be susceptible to blackmail, coercion, and undue influence. Finally, a person who violates a drug certification also poses the risk that he will pick and choose which security rules to follow with respect to safeguarding classified information.

^{3/} Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, to include knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

Based on the record before me, I conclude that the DOE properly relied on Criteria K and L when it suspended the individual's security clearance based on the individual's 2002 positive drug test for illegal drugs.

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual's eligibility for access authorization. See *Personnel Security Hearing* (Case No. VSO-0244), 26 DOE ¶ 82,797 (1999) (affirmed by OSA, 1999); *Personnel Security Hearing* (Case No. VSO-0154), 26 DOE ¶ 82,794 (1997), *aff'd*, *Personnel Security Review* (Case No. VSA-0154), 27 DOE ¶ 83,008 (1998) (affirmed by OSA, 1998). In this case, the individual has raised several arguments in an attempt to mitigate the DOE's security concerns.

B. Mitigating Evidence

1. Documentary Evidence

The individual submitted 13 character references into the record. Exs. C-O. Cumulatively, the exhibits reflect that the individual is a dedicated, competent, and reliable worker and a good husband and father. Some of the exhibits also reflect that the individual is a valuable asset to his company, while others show that the individual's time and attendance records at work are exemplary. Ex. E, F, FF. ^{4/}

The individual also tendered into the record exhibits showing negative results from drug tests taken before and after his August 2002 positive drug test. The first of these exhibits is a Drug Test Summary Report from the Medical Center associated with a DOE contractor that shows that the individual tested negative for illegal drugs on two pre-employment tests, October 5, 1999 and February 7, 2000, and on three random drug tests, September 28, 2000, May 24, 2001 and February 12, 2002. Ex. Q. The next exhibit shows that the individual tested negative on three drug tests administered in the months immediately following the positive drug test. Ex. V (September 5, 2002, November 11, 2002, and December 3, 2002 tests). The final three exhibits show that the individual tested negative on drug tests administered on April 23, 2003, May 13, 2003 and June 3, 2003. Exs. CC, DD, and EE. All of these exhibits constitute evidence in the individual's favor. They appear to support the individual's position that he did not use illegal drugs regularly. While these negative test results augur in the individual's favor, they, alone, do not convince me that the individual's illegal drug use was a one-time event.

2. Testimonial Evidence

It is the individual's contention that he did not knowingly and intentionally violate his drug certification or knowingly and intentionally use any illegal drugs at any time. This contention, if true, would be a positive factor in the individual's favor and would bear on the nature, extent and seriousness of the conduct at issue, the circumstances surrounding the conduct and the motivation for the conduct.

^{4/} The Part 710 regulations prohibit me from considering the effect of the loss of the individual's access authorization on the mission of the DOE. 10 C.F.R. § 710.27(b).

The individual testified that the day before his random drug test, he was experiencing back pain and accepted what he thought were two “Bufferin” from a former co-worker (the former co-worker will be referred to as Mr. X). Tr. at 38-40. According to the individual, he questioned Mr. X whether the pills being offered were prescription medication and Mr. X responded negatively. *Id.* at 40. The individual testified that the pills were in a “white container with a twist-off lid.” *Id.* at 51. The individual also testified that after he ingested the two pills, he did not feel any different than before he took the pills. *Id.* at 52-53. The individual also did not recall whether the two pills relieved his back pain. *Id.* According to the individual, this was the first time that he accepted what he thought was “over-the-counter” medicine from anyone other than the medic at his place of employment. *Id.* at 54. At the hearing, the individual revealed that his home is only one mile from the location where he met Mr. X. When queried why he did not wait until he returned home to take a pain reliever, he responded, “I don’t know, I just never really gave it much thought.” *Id.*

One of the individual’s co-workers (Co-worker #1) who testified on the individual’s behalf knows Mr. X and related that Mr. X’s reputation in the community is that of a drug user. *Id.* at 81. He added that based on his personal observation of Mr. X he believes Mr. X exhibits signs that he was “under the influence of some chemical.” *Id.* at 72. Co-worker # 1 related that he could fill the hearing room with people from the town in which the individual and Mr. X reside who would attest to Mr. X’s reputation as a drug user. *Id.* Co-worker # 1 also provided a credible account of a personal encounter with Mr. X which cast aspersions on Mr. X’s character. *Id.* at 72.

On re-direct examination, the individual’s lawyer asked the individual if he had any reason to believe that Mr. X would give him illegal drugs. *Id.* at 128-129. The individual responded, “no,” adding, “[h]earsay in a small town - - you know, if somebody says the wrong thing, by the time it gets across town, it’s a major deal.” *Id.* at 129. The individual did admit, however, that he knew Mr. X had a felony conviction many years ago and resigned from his job with a DOE contractor after he was arrested for possessing a handgun. *Id.* at 63, 55.

The individual’s wife testified that she and the individual have been married since 1995, and that her husband has never taken illegal drugs. *Id.* at 119, 117. She related that her husband is a “homebody.” *Id.* at 115. She added that her husband does little except work and play softball two nights each week. *Id.*

The individual’s manager testified that after the individual tested positive on a random drug test, the individual asked for his employer’s help. *Id.* at 94. With regard to the circumstances of the positive drug test, the manager related that the individual told him that “he’d been to a ball game a night or two before – and that he’d had a backache, his back was hurting him, and a fellow ball player there said, ‘Well, what’s wrong?’ [The individual] said, ‘I pulled a muscle in my back,’ or ‘I hurt my back,’ or something. [The ball player] said, ‘Here, take one of these pills, and it will help make you feel better, and he took one or – one pill . . .’” *Id.* at 98.

On re-direct examination, the individual testified that his manager’s account of the circumstances that led to the individual’s positive drug test is inaccurate. *Id.* at 124. He explained that when he told his manager about the positive drug test, he “did break down, and I told them the whole scenario, and that softball

attributed to my back hurting more, but I didn't tell him it was at the . . . ballpark . . . I think he just got a little mixed up, but then again it could have been - - like I said, I broke down when I told them.” *Id.*

In the end, the individual argues that he did nothing wrong. *Id.* at 44. He testified that he trusted a former co-worker and made a mistake. *Id.* He claims that if he had known what he took was illegal that he never would have taken it. *Id.* at 45. Furthermore, he contends that the positive drug test was an isolated incident, and points out that since August 2002 he has taken six or seven other drug tests, all of which yielded negative results.

I am not convinced that the individual's account of the circumstances that led to his ingestion of the methamphetamines and amphetamines is true. It strains credulity that the individual would trust a former co-worker whose reputation in the community is that of a drug user and whose character is somewhat shady to provide him with untainted over-the-counter medication. While the individual suggests that he did not know that the former co-worker was a drug user, I did not believe him.

I also found it hard to believe that the individual experienced no effects from the amphetamines and methamphetamine that he ingested. According to a Research Report from the National Institute on Drug Abuse that the DOE submitted as an exhibit, methamphetamine is a powerful stimulant and “even in small doses can increase wakefulness and physical activity and decrease appetite.” Ex. 6. In addition, that document reports that “[o]ral ingestion [of methamphetamine] produces a long-lasting high instead of a rush, which reportedly can continue for as long as half a day.” *Id.*

The individual also did not provide credible testimony as to why he accepted what he allegedly thought was an over-the-counter pain-reliever from a person of questionable repute when he could have driven only one mile to his home and taken his own pain reliever. There is nothing in the record to indicate that the individual's back pain was so severe or incapacitating that he could not have waited a few minutes to take his own over-the-counter medication at his home. Moreover, I was not convinced by the individual's testimony that he had never before accepted over-the-counter medication from anyone but a medic and that he did so in the instance in question because he trusted Mr. X.

Moreover, the testimony of the individual's manager cast doubt on the veracity of the individual's version of the circumstances that led to his positive drug test. The manager testified that the individual told him immediately after the positive drug test that he had accepted some pills from a fellow softball player at a soft ball game. While it is possible that the manager's recollection is faulty or that the manager was confused by the individual's explanation due to the individual's emotional state at the time, I found the manager to be a credible witness whose testimony was convincing. For this reason, I will not rely on the unsubstantiated rebuttal testimony of the individual that the manager's recollection of events is inaccurate.

In addition, the law applicable to this case is unequivocal. In other personnel security cases in which a person who has had a positive drug test and has sought to overcome the security concern with an explanation that the drug use was unintentional, Hearing Officers have required the person to provide corroboration of his or her version of the events that led to the positive drug test. *Personnel Security Hearing* (Case No. VSO-0551), <http://www.oha.doe.gov/cases/security/vso0051.pdf>; *Personnel*

Security Hearing (Case No. VSO-0273), 27 DOE ¶ 82,814 (1999), *affirmed*, *Personnel Security Review*, 27 DOE ¶ 83,026 (1999) (affirmed by OSA, 2000); *Personnel Security Hearing* (Case No. VSO-0163), 26 DOE ¶ 82,799 (1996) (affirmed by OSA, 1998); *Personnel Security Hearing* (Case No. VSO-0084), 26 DOE 82,753 (1996) (affirmed by OSA, 1996). The individual's own assertions that minimize the security concern associated with his positive drug test generally cannot themselves form a sufficient basis for the restoration of a security clearance. *See Personnel Security Review* (Case No. VSA-0087), 26 DOE ¶ 83,001 (1996).

In the present case, I find that corroboration is necessary to overcome the inherent implausibility of the individual's version of the events leading up to his positive drug test. The individual did not provide any corroboration for his account of events. He did not, for example, call Mr. X as a witness or even request a subpoena to compel Mr. X's attendance at the hearing. During the hearing, counsel for the individual stated that "we were not able to find [Mr. X]." Tr. at 7. The individual testified that before Mr. X moved, he tried to discuss the incident with Mr. X and Mr. X stated that he did not want to get involved. *Id.* at 60. The individual added that he had severed his ties with Mr. X, noting, however, that "even if I see him in town, I don't acknowledge his presence." *Id.* at 60.

In summary, I was not convinced by the evidence submitted by the individual that his version of the events leading up to his positive drug test is true. Specifically, I found the following arguments advanced by the individual to be unpersuasive: (1) the only time that the individual ever accepted over-the-counter medication from anyone other than a medic was the time that the individual accepted the pills from Mr. X; (2) the individual trusted a person whose reputation in the community is that of a drug user to provide him with untainted over-the-counter medication; (3) the individual who, by his own testimony, worked closely with Mr. X and knew of Mr. X's previous encounters with the law did not know of Mr. X's reputation in the community as a drug user; (4) the individual experienced no effects from the amphetamines and methamphetamines that he ingested; and (5) the manager to whom the individual contemporaneously reported the circumstances that lead to his positive drug test incorrectly testified at the hearing .

In addition to my reservations about the individual's candor about the events leading up to his positive drug test, the individual's inability to provide any corroboration at all for his version of his illegal drug use compels me to reject his contention that he inadvertently used illegal drugs, and that his drug use was a one-time occurrence. These findings combined with the fact that the individual used illegal drugs and violated his drug certification fairly recently lead me to conclude that the individual has not mitigated the security concerns associated with Criteria K and L. 5/.

5/ As I evaluated the evidence, I also considered as factors in the individual's favor the testimony of a co-worker (Co-worker #2) and the individual's manager who opined about the individual's technical competency and professionalism. *Id.* at 86-91; 104. Reliability and competence on the job, however, cannot alone overcome the security concerns at issue in this case

V. Conclusion

In the above analysis, I have found that there is sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria K and L as to whether the individual's suspended access authorization should be restored. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, I have found that the individual has failed to bring forth sufficient evidence to mitigate these security concerns. I am therefore unable to find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be restored. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: October 27, 2003